

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY
DEPARTMENT OF CORPORATIONS

TO: Bath Junkie Franchise, Inc.
Judy Zimmer
Steven Kay
Jon Zimmer
104 N.E. Avenue, Suite D
Fayetteville, AR 72701

CITATION

AND

DESIST AND REFRAIN ORDER

(For violations of sections 31110, 31119, 31200 and 31201 of the California Corporations Code)

The California Corporations Commissioner ("Commissioner") finds that:

1. At all times relevant hereto, Bath Junkie Franchise, Inc. ("Bath Junkie") was an Arkansas corporation with its principal place of business at 104 N.E. Avenue, Suite D, Fayetteville, Arkansas 72701. The company maintains a website at www.bathjunkie.com.

2. At all times relevant hereto, Judy Zimmer was the Chief Executive Officer, president and a "control" person of Bath Junkie. "Control" is defined by California Corporations Code section 160.

3. At all times relevant hereto, Jon Zimmer was the Vice President, Secretary, Treasurer and a control person of Bath Junkie.

4. At all times relevant hereto, Steven Kay was the Vice President, General Counsel and a control person of Bath Junkie.

5. Since at least in or about August 2006, Respondents have offered and sold franchises in California pursuant to franchise agreements. The agreements grant the right to engage in the business of offering, selling, and distributing products and services under Bath Junkie Inc.'s exclusive trademarks, including service marks and trade names. Bath Junkie's offering circular states that the

1 company “offers franchises for the operation of retail stores selling high-quality, custom-blended bath
2 and body products, and related items.”

3 6. On July 19, 2007, Bath Junkie filed an initial application with the Commissioner for a
4 registration to offer and sell franchises in California (the “2007 Franchise Application”)¹ upon a
5 Uniform Franchise Registration Application pursuant to Corporations Code Section 31111 and
6 California Code of Regulations, Rule 310.111(b).²

7 7. Section 31114 and Rule 310.111 require that the franchise application include a copy of the
8 offering circular (or “UFDD”), with all information required by the Uniform Franchise Disclosure
9 Document (UFDD) Guidelines.³

10 8. On October 12, 2007, the Commissioner issued an Order Designating Registration Period
11 providing that Bath Junkie’s registration to offer and sell franchises commenced July 19, 2007 and
12 would terminate on April 20, 2008.

13 9. Bath Junkie failed to file an application for renewal within the time period set forth in
14 Section 31121; as a result, Bath Junkie’s 2007 registration terminated April 20, 2008, and
15 Respondents had no registration to offer or sell franchises in California after such date.

16 10. Despite the termination of Bath Junkie’s registration to offer and sell franchises in
17 California on April 20, 2008, Respondents continued to offer and sell franchises in both 2008 and
18 2009, in violation of Section 31110.

19 11. On or about July 2, 2008, Respondents offered a Bath Junkie franchise to California
20 residents (“Residents”) for the area of Palm Springs, California. At the time of the offer, Respondents
21 told the Residents that Bath Junkie had submitted all of its registration information to the State of
22 California. Steven Kay even went so far as to write, “I am certain that the final approval will be
23

24
25 ¹ Bath Junkie had a previous registration to offer and sell franchises in California, but this registration terminated on April
26 20, 2007 without renewal.

27 ² All references to “Section(s)” are to the California Corporations Code; all references to “Rule(s)” are to Title10,
28 California Code of Regulations, Chapter 3, Subchapter 2.6 (Franchises).

³ On or about July 1, 2007, the required information from an applicant for franchise registration changed from the
Uniform Franchise Offering Circular (“UFOC”) to the Uniform Franchise Disclosure Document (“UFDD”); when filing
the UFDD, the term “offering circular” means “disclosure document” and the term “UFOC” means “UFDD.” See Cal.
Code Regs. 310.111.

1 completed within the next four weeks.” However, at the time Bath Junkie had not submitted any
2 application for franchise registration; its application was not submitted until July 14, 2008.

3 12. On July 14, 2008, Respondents submitted an application for registration to offer and sell
4 franchises (the “2008 Franchise Application”). In response to the 2008 Franchise Application, the
5 Commissioner sent Respondents a comment letter dated August 4, 2008 that identified material
6 changes that must be submitted in order to complete the 2008 Franchise Application.

7 13. The requested information was never submitted to the Commissioner. Therefore, on July
8 21, 2009, the Commissioner issued an Order Declaring Application Abandoned with regard to the
9 2008 Franchise Application.

10 14. On or about August 5, 2008, Respondents informed the Residents that Bath Junkie was
11 now registered to offer and sell franchises in California and thus they could execute the franchise
12 agreement for the Bath Junkie in Palm Springs. Therefore, on or about August 11, 2008, Respondents
13 and Residents executed the franchise agreement for the Palm Springs Bath Junkie. Pursuant to the
14 agreement, Residents paid a \$45,000 non-refundable initial franchise fee, in addition to monthly
15 royalty and marketing fees. However, at the time, Respondents were not, in fact, licensed to offer or
16 sell franchises in California. The Residents opened the Palm Springs Bath Junkie store on or about
17 September 5, 2008.

18 15. In connection with the sale of the Palm Springs Bath Junkie, Respondents failed to provide
19 the Residents with a proper offering circular, including financial statements, as required by Section
20 31119 and Rules 310.111.2 and 310.114.1:

- 21 a. Section 31119 prohibits the sale of a franchise without providing the prospective
22 franchisee with the offering circular at least 14 days in advance.
- 23 b. Rule 310.111.2 states that the financial statements in the offering circular mean (i) a
24 balance sheet as of date within 90 days prior to the application date, and (ii) audited
25 profit and loss statements for each of the three fiscal years prior to date of balance sheet
26 and for the period, if any, between close of last fiscal year and date of the balance sheet.
- 27 c. Rule 310.114.1 requires that the offering circular include the information required by
28 the Uniform Franchise Registration Application, as modified by this section; Item No.

21 of the uniform application requires audited financial statements for the two previous fiscal year ends.

16. Rather than providing the Residents with the UFDD that Respondents submitted to the Commissioner with the 2008 Franchise Application, Respondents instead gave the Residents an old UFDD, from 2007. The old UFDD did not include the most current material information and financial statements as required by Section 31119 and Rules 310.111.2 and 310.114.1. Instead, in connection with the August 11, 2008 sale, the Residents were given financial statements from 2005 and 2006.

17. Respondents made misrepresentations and omissions of material fact in connection with the offer and sale of the Palm Springs Bath Junkie, including but not limited to the following:

- a. Respondents told Residents in early July 2008 that they had filed a renewal of their registration to offer and sell franchises and that the renewal would already have been approved but for an IRS audit; in fact, Bath Junkie missed the deadline to file a renewal registration and its registration had expired.
- b. On July 2, 2008, Respondents told Residents that Bath Junkie had submitted all of its information to the State of California for its renewal registration. In fact, Bath Junkie had not submitted any information to the state; its application was not submitted until July 14, 2008.
- c. On August 5, 2008, Respondents told Residents that Bath Junkie's franchise registration had been approved and therefore, Bath Junkie and Residents could execute the Palm Springs Bath Junkie franchise agreement; in fact, Bath Junkie's registration had not been approved.
- d. Respondents gave the Residents old financial statements (from 2005 and 2006), rather than the more current financial statements submitted with the 2008 Franchise Application.
- e. Respondents gave the Residents an old UFDD, rather than the 2008 UFDD submitted with the 2008 Franchise Application.

18. Despite not having a registration, Respondents continued to offer and sell franchises in California. On or about August 17, 2009, Respondents and the Residents executed a franchise

1 agreement for a Bath Junkie franchise in San Diego, California (the “San Diego Bath Junkie”).
 2 Pursuant to the agreement, Residents paid a \$35,000 non-refundable initial franchise fee, in addition to
 3 monthly royalty and marketing fees.

4 19. In connection with the sale of the San Diego Bath Junkie, Respondents failed to provide
 5 the Residents with any UFDD and/or financial statements, in violation of Section 31119.

6 20. Respondents also failed to tell the Residents about the company’s financial problems. In
 7 fact, a mere month after the sale of the San Diego Bath Junkie, on or about September 15, 2009,
 8 Respondents filed a voluntary Petition for Bankruptcy under Chapter 11 of the Bankruptcy Code in the
 9 United States Bankruptcy Court for the Western District of Arkansas.

10 21. Respondents made misrepresentations and omissions of material fact in connection with
 11 the offer and sale of the San Diego Bath Junkie, including but not limited to the following:

- 12 a. Respondents failed to tell the California Residents that Bath Junkie was not registered
 13 to offer or sell franchises in California.
- 14 b. Respondents failed to give the California Residents any financial statements, a required
 15 disclosure.
- 16 c. Respondents failed to give the California Residents a UFDD, omitting additional
 17 required disclosures.
- 18 d. Respondents failed to tell Residents that Bath Junkie was having financial problems.
 19 In fact, Respondents filed a Chapter 11 bankruptcy petition in the United States District
 20 Court, Western District of Arkansas, shortly after the San Diego franchise agreement
 21 was executed.

22 22. Finally, Respondents made willful misrepresentations and omissions of material fact in the
 23 2007 Franchise Application and the 2008 Franchise Application, in violation of Section 31200,
 24 including but not limited to the following:

- 25 a. In the 2007 Franchise Application, Respondents stated in the Sales Agent Disclosure
 26 Form submitted for both Judy Zimmer and Steven Kay that there were no pending civil
 27 actions alleging a violation of franchise law, fraud, unfair or deceptive practices,
 28 misappropriation of property or comparable allegations. In fact, Zimmer and Kay were

1 both named in a pending action alleging such claims, *Bath Junkie Branson, L.L.C. v.*
2 *Bath Junkie, Inc. et al, L.L.C. v. Bath Junkie, Inc. et al.*, United States District Court for
3 the Western District of Missouri, Case No. 04-3421-CV-S-RED.

- 4 b. The description of litigation provided in the UFDD submitted with the 2007 Franchise
5 Application stated with regard to the *Bath Junkie Branson* case, “In February 2007 this
6 case was settled pursuant to a pending confidential settlement agreement.” 2007
7 Franchise Application, pp. 5-6. In fact, at the time the application was filed,
8 Respondents had refused to execute the settlement agreement. Ultimately, the court
9 enforced the agreement, and Respondents listed the \$95,000 owed Bath Junkie Branson
10 (their largest unsecured creditor) when they filed for bankruptcy in September 2009.
- 11 c. In the 2008 Franchise Application, Respondents stated in the Sales Agent Disclosure
12 Form submitted for both Judy Zimmer and Steven Kay that there were no pending civil
13 actions alleging a violation of franchise law, fraud, unfair or deceptive practices,
14 misappropriation of property or comparable allegations. In fact, Zimmer and Kay were
15 both named in a pending action alleging such claims, *Bath Junkie Branson*.
- 16 d. The description of litigation provided in the UFDD submitted with the 2008 Franchise
17 Application claimed the *Bath Junkie Branson* case had settled, but, “In May of 2007
18 Bath Junkie Filed an appeal based upon a discrepancy in the settlement agreement and
19 the need for a hearing on the matter” 2008 Franchise Application, p. 6. In fact, at
20 the time the application was filed, the Eight Circuit Court of Appeals had already
21 issued an opinion and judgment affirming the lower court judgment. Respondents
22 listed the \$95,000 owed Bath Junkie Branson (their largest unsecured creditor) when
23 they filed for bankruptcy in September 2009.

24 Based on the foregoing findings, the Commissioner is of the opinion that Bath Junkie
25 Franchise, Inc., Judy Zimmer, Steven Kay and Jon Zimmer have engaged in the offer and sale of
26 franchises in this state that are subject to registration under the Franchise Investment Law without the
27 offers first being registered, in violation of Corporations Code section 31110. Pursuant to
28 Corporations Code sections 31402 and 31406, Respondents are hereby cited and ordered to desist and

1 refrain from the further offer or sale of franchises unless and until the offers have been duly registered
2 under the Franchise Investment Law or unless exempt.

3 Further, the Commissioner is of the opinion that Bath Junkie Franchise, Inc., Judy Zimmer,
4 Steven Kay and Jon Zimmer failed to provide prospective franchisees with a proper offering circular
5 and financial statements, in violation of Corporations Code section 31119 and Rules 310.111.2 and
6 310.114.1. Respondents are hereby ordered to desist and refrain from violating Corporations Code
7 section 31119 and Rules 310.111.2 and 310.114.1.

8 Additionally, the Commissioner is of the opinion that Bath Junkie Franchise, Inc., Judy
9 Zimmer, Steven Kay and Jon Zimmer willfully made untrue statements of a material fact, or omitted
10 to state material facts required to be stated, in the 2007 Franchise Application and the 2008 Franchise
11 Application, in violation of Corporations Code section 31200. Pursuant to section 31406,
12 Respondents are hereby ordered to desist and refrain from making misrepresentations or omissions in
13 any application or other report filed with the Commissioner.

14 Additionally, the Commissioner is of the opinion that Bath Junkie Franchise, Inc., Judy
15 Zimmer, Steven Kay and Jon Zimmer engaged in the offer and sale of franchises in this state by
16 means of written or oral communications which include an untrue statement of a material fact or omit
17 to state a material fact necessary in order to make the statements made, in light of the circumstances
18 under which they were made, not misleading, in violation of Corporations Code section 31201.
19 Pursuant to section 31406, Respondents are hereby ordered to desist and refrain from the further offer
20 or sale of franchises, including but not limited to Bath Junkie franchises, by means of written or oral
21 communications which include an untrue statement of material fact or omit to state a material fact
22 necessary in order to make the statements made, in light of the circumstances under which they were
23 made, not misleading.

24 In light of the foregoing findings, pursuant to Corporations Code section 31406, Bath Junkie
25 Franchise, Inc., Judy Zimmer, Steven Kay and Jon Zimmer are hereby ordered to pay to the
26 Commissioner an administrative penalty in the amount of twenty thousand dollars (\$20,000), for two
27 violations of each of sections 31110, 31119, 31200 and 31201 of the Corporations Code.
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The Citation and Order is necessary, in the public interest, for the protection of investors and consistent with the purposes, policies and provisions of the Corporate Securities Law of 1968.

California Corporations Code section 31406 provides, in relevant part:

(a) If, upon inspection or investigation, based upon a complaint or otherwise, the commissioner has cause to believe that a person is violating any provision of this division or any rule or order promulgated pursuant to this division, the commissioner may issue a citation to that person in writing describing with particularity the basis of the citation. Each citation may contain an order to desist and refrain and an assessment of an administrative penalty not to exceed two thousand five hundred dollars (\$2,500) per violation and shall contain references to this section, including the provisions of subdivision (c)

...

(c) If within 60 days from the receipt of the citation, the person cited fails to notify the commissioner that the person intends to request a hearing as described in subdivision (d), the citation shall be deemed final.

(d) Any hearing under this section shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. . . .

Dated: February 25, 2011

PRESTON DuFAUCHARD
California Corporations Commissioner

By _____
Alan S. Weinger
Deputy Commissioner
Enforcement Division